BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of BellSouth Emergency Petition for Declaratory Rule and Preemption of State Action	))))))	WC Docket No. 04-245

REPLY COMMENTS OF ALPHEUS COMMUNICATIONS, L.P., CBEYOND COMMUNICATIONS, LLC, CTC COMMUNICATIONS CORP., MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., AND TDS METROCOM, LLC.

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August 16, 2004

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Alpheus Communications, L.P. f/k/a El Paso Networks, L.P., Cbeyond Communications, LLC, CTC Communications Corp., McLeodUSA Telecommunications Services, Inc. and TDS Metrocom, LLC. (Commenters) hereby respectfully submit reply comments in the above-captioned docket in response to the Emergency Petition for Declaratory Ruling and Preemption of State Action ("Petition") that was filed by BellSouth Telecommunications, Inc. ("BellSouth") on July 1, 2004.

I. The FCC's Exclusive Jurisdiction Over LATA Boundaries that Was Established in the MFJ Does Not Prohibit States from Regulating Under Section 271.

Verizon and SBC claim that because states had no jurisdiction over the implementation of the Modification of the Final Judgment ("MFJ"), states are thereby prohibited from regulating under section 271.[1] However, Congress in the 1996 Act abolished the MFJ and replaced it with

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[1] Verizon Comments at 9-10 (citing *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U S West Petitions to Consolidate LATAs in Minnesota and Arizona*, NSD-L-97-6, Memorandum Opinion and Order, 14 FCC Rcd 14392, FCC 99-222, ¶ 16 (1999) ("*InterLATA Boundary Order*")); SBC Comments at 4.

the various requirements of Section 271. In this connection, Section 271 is not a mere replacement of the MFJ but an entirely new regulatory framework which for the first time permitted the Bell Operating Companies ("BOCs") to offer long distance service. In contrast to the MFJ, section 271 of the Act allows BOCs to offer long distance service so long as the Commission concludes that they have sufficiently opened their local markets to competition in a given state.[2] Further, this new framework must be interpreted consistently with other provisions of the Act. As explained in initial comments, far from abolishing state authority, the Act specifically preserves state authority in a number of important respects.[3] Therefore, the fact that states may or may not have exercised any authority over implementation of the MFJ is irrelevant to the issue of the extent to which states may set prices for 271 network elements.

II. *USTA II* Does Not Restrict States' Ability to Set Prices for 271 UNEs.

Verizon submits that permitting states to set 271 network element prices would err in the same way that the Commission erred in giving states a role in the Section 251 impairment analysis, as found in *USTA II*.[4] Verizon contends that state commissions may not regulate 271 elements because the authority to regulate is delegated exclusively to the Commission and not to the states. Significantly, *USTA II* relied on Section 251(d)(2) which specifically instructs 'the Commission" to make impairment determinat[ions]."[5] Under section 271(d)(3), only the

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2 *See TRO*, ¶ 655.

3 *See, e.g.*, Commenters' Comments at 11 & 17-18 (recognizing specific state authority under 47 U.S.C. §§ 251(d)(3), 252(d), and 261(c)); AT&T Comments at 12-18 (recognizing state authority under section 252 that applied to sections 271(c)(1)(A) & 271(c)(2)(A)); Z-Tel Comments at 6-14 (same); TRA Opposition at 10-17 (same).

4 Verizon Comments at 8-9 (citing *United States Telecom. Ass'n v. F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004) ("*USTA II*")).

5 *USTA II*, at 565.

Commission can "determine[]" whether to approve or deny a BOC's application to offer interLATA long distance service. Once an application is granted, the Commission may under the statue (presumably after receiving a 271 complaint) "determine" if a BOC has ceased to meet any of the conditions required for the approval of its application and may order the BOC to correct the deficiency, impose penalties, or suspend or revoke such approval.[6] In this case, the Tennessee Regulatory Authority ("TRA") did not purport to grant a 271 application or address a 271 complaint. Nor does a state setting market based prices for 271 UNEs constitute grant of an application or the resolution of a 271 complaint. Indeed, should BellSouth refuse to offer just and reasonable rates for 271 UNEs as ordered by the TRA then a 271 complaint to the Commission would be ripe. Given this and in the absence of a comparable express statutory provision reserving to the Commission the exclusive role of setting post-grant Section 271 pricing, there is no statutory basis for a finding that states may not set a market based price for 271 UNEs. Accordingly, Verizon's reliance on *USTA II* is misplaced and that case may be disregarded in connection with this proceeding.

III. 271 UNEs Must Be Made Available to Local Exchange Carriers Irrespective of the Jurisdictional Nature of the Traffic.

Qwest argues that states have no authority to set prices for 271 UNEs because they will be used to provide both interstate and intrastate services, and state regulators have no authority under the Act to set prices for interstate services.[7] As explained in the Joint Commenters' initial Comments, states have long-standing authority to regulate the rates, terms and conditions of local services offered in their state by local exchange companies.[8] Section 271 does not revoke

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6 *See* 47 U.S.C. § 271(d)(6).

7 Qwest Comments at 12-19.

8 Commenters' Comments at 12-18.

that authority. In fact, elsewhere in the Act state authority is specifically preserved.[9] Therefore, the fact that 271 UNEs may be used for interstate services does not by itself or under the statute preclude states from setting prices, at minimum, for intrastate 271 unbundling. Moreover, for all the reasons stated in initial comments, the Commission would face a very high burden in attempting to preempt state ratemaking authority and has been reversed by the Supreme Court in trying to do so previously.[10] Therefore, the Commission should reject Qwest's argument that interstate state use of 271 UNEs precludes state authority.

IV. State Pricing Authority Over 271 UNEs Is Practical and Appropriate.

SBC argues that if states established rates, terms and conditions for 271 UNEs, "ILECs inevitably would be subject to a patchwork quilt of regulatory regimes, and that outcome would conflict with the federal interest in a 'workable, uniform system.'"[11] Verizon claims that this potential for patchwork regulation resulting from the application of fifty bodies of law, conflicts with Section 202's prohibition on providing advantages or preferences to customers based on their locality citing *Boomer v. AT&T Corp.*, 309 F.3d 404, 420 (7th Cir. 2002).[12] These arguments are unpersuasive. Section 202 governs interstate services and *Boomer* found that it was Congress' intent that individual long-distance customers throughout the United States receive uniform rates, terms and conditions of service. However, as noted previously, and which BOCs are determined to ignore, Congress in the Act reserved authority over intrastate communications to the states. To the extent this involves "patchwork" regulation, Congress has

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9 See supra n. 3.

10 Commenters' Comments at 12-18 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986)).

11 SBC Comments at 9-10.

12 Verizon Comments at 13 (quotations omitted, citing *Boomer v. AT&T Corp.*, 309 F.3d 404, 420 (7th Cir. 2002)).

approved and authorized it. *Boomer* does not require that each state abandon the establishment of own specific rates, terms, and conditions for intrastate services including Section 271 intrastate unbundling. Accordingly, *Boomer* is irrelevant to the issues raised in this proceeding.

V. State 271 UNE Pricing Authority Would Promote "Commercial Negotiations."

Verizon contends that state law regulation of 271 elements would impede commercial agreements for 271 elements. Verizon submits that the "possibility of state commission review and potential modification of voluntary commercial agreements will encourage parties to attempt to use the regulatory process to improve further on terms of a negotiated deal, thus diminishing the parties' ability to lock one another in at the bargaining table."[13] This argument is specious and asks the Commission to assume, erroneously, that BOCs are willing to negotiate. As AT&T points out, BOCs currently have absolutely *no incentives to negotiate* reasonable rates, terms and conditions for 271 UNEs since all of the BOCs have been granted 271 authority.[14] For the most part, all the bargaining power rests with the BOCs and they have no plausible incentive to engage in bona fide good faith give and take negotiations regarding these facilities.[15] Indeed, BellSouth's proposed excessive switching rate and its "take it or leave it" attitude with ITC Deltacom is a perfect example of a BOC's unwillingness to compromise and need for a state commission to force a BOC's hand.[16] If anything, the threat of state commission involvement encourages rather than discourages negotiated commercial agreements.

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[13] Verizon Comments at 13.

[14] AT&T Comments at 19-20.

[15] *Id.* at 19; Covad at 13; ITC-Deltacom at 10; PACE Comments at 14.

[16] *See* ITC Deltacom Comments at 10; Pace Coalition Comments at 14-15.

CONCLUSION

For the foregoing reasons, and for the reasons previously articulated by the Commenters, TRA, and other CLECs that oppose BellSouth's Petition, the Commission should deny the Petition.

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